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No. 662

In the Supreme Court of the United States

OCTOBER TERM, 1959

ROBERT CUSHMAN MURRAY, ET AL., PETITIONERS

v.

LLOYD BUTLER, AREA SUPERVISOR, PLANT PEST CONTROL DIVISION OF THE AGRICULTURAL RESEARCH SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, AND DANIEL CAREY, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BUTLER IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
HOWARD A. JACOBS,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

The memorandum opinion of the district court denying petitioners' motion for a preliminary injunction (R. 1b–9b) [1] is reported at 151 F. Supp. 786. The opinion of the district court on the merits (R.

*While the caption to the petition also refers to Secretary of Agriculture Benson, the complaint against the Secretary was dismissed on jurisdictional grounds. See p. 4, *infra*. This dismissal was not appealed by petitioners.

[1] "R.—a" refers to the appellants' appendix in the court of appeals; "R.—b," to the appellee's appendix.

313a–331a) is reported at 164 F. Supp. 120. The opinion of the court of appeals (Pet. 9a–15a) is reported at 270 F. 2d 419.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1959. A timely petition for rehearing was denied on October 30, 1959. The petition for a writ of certiorari was filed on January 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' claim for injunctive relief is moot.

2. Whether petitioners were entitled to recover damages from the federal official who supervised the conduct of the spraying program.

3. Whether there was statutory authority for the aerial spraying of petitioners' property to eradicate the gypsy moth.

4. Whether aerial spraying of petitioners' property violated due process.

STATUTE INVOLVED

Section 102(a) of the Department of Agriculture Organic Act of 1944, 58 Stat. 735, as amended, 7 U.S.C. 147a(a), provides:

> (a) The Secretary of Agriculture either independently or in cooperation with States or political subdivisions thereof, farmers' associations, and similar organizations, and individuals, is authorized to carry out operations or measures to eradicate, suppress, control, or to prevent or retard the spread of insect pests,

> * * * such as * * * gypsy and brown-tail moth * * * In performing the operations or measures herein authorized, the cooperating * * * State, or local agency shall be responsible for the authority necessary to carry out the operations or measures on all lands and properties within the * * * State other than those owned or controlled by the Federal Government and for such other facilities and means as in the discretion of the Secretary of Agriculture are necessary. * * *

STATEMENT

In 1956 the Department of Agriculture, in cooperation with fifteen state governments, embarked upon a program for the progressive eradication of the gypsy moth—an insect which defoliates and kills trees—through the means of a systematic spraying of DDT over large areas. In 1956 the spraying program covered 446,000 acres in New York; 152,000 in New Jersey; and 89,000 in Pennsylvania. In 1957 the program was extended to an additional 3.4 million acres in ten states. (R. 133b–134b, 204b–205b, 222b).

Petitioners are residents of Long Island, New York. The areas in which they live were among those sprayed in the 1957 campaign (R. 13a). This action was instituted in May 1957, prior to the spraying of those areas, against Secretary of Agriculture Benson; respondent Butler, the federal official responsible for supervising the program in the locale of petitioners' property; and respondent Carey, Commissioner of Agriculture and Markets of New York, whose agency was cooperating with the Department of Agriculture

in the spraying program. In their complaint, petitioners asked for a permanent injunction against the proposed spraying, a temporary restraint, and such damages as would be caused if the spraying were not restrained (R. 17a). The complaint asserted that the spraying was not authorized by statute and, additionally, violated petitioners' rights under the Fifth and Fourteenth Amendments. (R. 13a–14a.)

Petitioners' motion for a preliminary injunction was denied on May 24, 1957, by District Judge Byers, who also dismissed the complaint as against Secretary of Agriculture Benson for lack of jurisdiction (R. 1b–9b).[2] The spraying operation continued uninterrupted and was completed prior to the time the issues were joined and set for trial before District Judge Bruchhausen. In their answers to the complaint, respondents alleged, *inter alia,* that, in view of the completion of the spraying, petitioners' request for injunction had become moot (R. 28a).

After a lengthy trial, the district court held, *inter alia,* that the spraying was clearly authorized by statute, within constitutional limitations, and that petitioners had not established damage (R. 334a–336a). In so holding, the court found it unnecessary to consider the claim for injunctive relief, and thus did not reach the issue of mootness.

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[2] In the trial on the merits before District Judge Bruchhausen, the Government argued that Judge Byers' ruling required dismissal of the entire case because the Secretary of Agriculture was an indispensable party. The district court rejected this contention (R. 324a–325a, 334a) and the court of appeals did not discuss the issue although the Government presented it as a ground for dismissal.

The court of appeals vacated the judgment of the district court on the matter of injunctive relief and remanded with instructions to dismiss that portion of the complaint as moot (Pet. 15a). It held that "the 1957 spraying program, which precipitated this suit, has been completed and the record amply indicates the unlikelihood of a future aerial spraying in the area of plaintiffs' property." (Pet. 11a–12a). The court did not discuss the question of whether the actions in question were authorized or constitutional, but determined that "in any event [petitioners] are not entitled to damages on the record before us." (Pet. 14a).

ARGUMENT

The court of appeals correctly determined that petitioners' claim for injunctive relief was moot. The court also correctly concluded that petitioners had not established "what damages, if any, they had suffered by reason of the spraying" (Pet. 14a). Moreover, a federal official cannot be held liable in tort for acts done in the course of the performance of his duties. In any event, the aerial spraying of petitioners' property was within the statutory authority of respondents and did not constitute a violation of petitioners' constitutional rights. Accordingly, further review by this Court is not warranted.

1. Petitioners do not challenge the conclusion of both courts below that it is unlikely that there will be a further aerial spraying in the area of petitioners' property (R. 334a; Pet. 11a–12a). In view of this finding, petitioners' claim for injunctive relief is plainly moot. See, *e.g.*, *United States ex rel. Nor-*

wegian Nitrogen Products Co. v. *Tariff Commission,* 274 U.S. 106; *Jones* v. *Montague,* 194 U.S. 147; *Richardson* v. *McChesney,* 218 U.S. 487.

Petitioners, to avoid this conclusion, rely (Pet. 25–28) upon a line of cases from *United States* v. *Trans-Missouri Freight Assn.,* 166 U.S. 290, to *United States* v. *W. T. Grant Co.,* 345 U.S. 629, for the proposition that voluntary cessation of a course of allegedly illegal conduct does not moot a case unless there is no reasonable expectation that it will be repeated. But the key to those cases was the "voluntary" nature of the cessation of acts which could just as "voluntarily" be resumed, and they are wholly inapplicable here.

In the cases relied upon, conduct allegedly in violation of the antitrust laws, wage-and-hour standards, or other regulatory laws had been pursued by the defendants for reasons of economic self-interest and had been stopped only after injunction suits had been brought to restrain the violations. The courts recognized that, if voluntary cessation or promise of reform could moot such cases, economic regulation would easily be evaded since the defendants would always be free, and would have every interest, promptly to resume their activity if the case were dismissed. *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 630, 632; *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 42–43; *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 307, 309. In those suits, there remained "cases or controversies" because the defendants' previous continuing conduct and their evident interests in, and the ease of, resumption, when taken together, indicated that

further violations of law in the near future "could be reasonably apprehended". Cf. *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U.S. 202, 208.

None of those circumstances is present here. Respondents did not engage in a continuing course of conduct but in a single aerial spraying operation. The operation was not done out of motives suggesting any self-interest or personal inclination to repeat, but solely in implementation of statutory authority to cope with an insect pest infestation which had reached threatening proportions. Nor was the program stopped "voluntarily" in order to forestall a court order, but, rather, solely because the planned spraying operation had been completed. It is apparent that another spraying of Long Island with DDT may not be "reasonably apprehended" unless and until certain objective facts occur—infestation of the gypsy moth again becomes serious. As was found below, and is implicitly conceded by petitioners, this possibility is remote. Thus, the action is moot.[3]

2. Both the district court and the court of appeals also found that petitioners had failed to establish that they had suffered compensable damage from the aerial spraying of their property (Pet. 14a). A settled rule of this Court makes concurrent findings of two courts

[3] Because of the factors set forth in the text, the doctrine of *United States* v. *W. T. Grant Co.*, *supra*, has never been applied against the United States. Where threatened governmental action is completed *pendente lite*, mootness has been avoided only when the action is by its nature periodic, and very likely to be repeated, like the issuance of regular biennial rate orders. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. Such action is not present in this case.

below final here in the absence of exceptional error. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214. Petitioners have failed to demonstrate that exceptional error was committed here.[4]

Further, in no event would petitioners be entitled to recover damages from respondent Butler. His supervision of the spraying program on Long Island was undertaken in the course of the performance of his official duties. A federal officer may not be held personally accountable to private parties for pecuniary damage caused by his official acts. *Spaulding v. Vilas,* 161 U.S. 483, 498; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. Cf. *Barr* v. *Matteo,* 360 U.S. 564.

3. While the court of appeals did not reach the question, the district court correctly concluded that the conduct of the aerial spraying program was clearly authorized by statute and did not violate petitioners' constitutional rights (R. 325a–331a, 334a–336a).

(a) The spraying program is a cooperative venture of the Department of Agriculture and the regulatory agencies of the states involved. Federal-state coordination is a typical feature of pest and disease control programs and was here expressly authorized by Congress. The Secretary of Agriculture is empowered "either independently or in cooperation with states * * * to carry out operations or measures to eradicate, suppress, control or to pre-

[4] It is to be noted that, as the court of appeals pointed out (Pet. 15a), petitioners' amended complaint, filed subsequent to the completion of both the spraying and the trial, contained no reference to the damage claim or the amount of damages sought.

vent or retard the spread of insect pests," including specifically the gypsy moth. Section 102(a) of the Department of Agriculture Organic Act of 1944, 7 U.S.C. 147a(a), *supra*, pp. 2–3.[5]

(b) Petitioners have failed to demonstrate that the gypsy moth program was not related to a legitimate public object or that the aerial spraying of DDT was not a reasonable and proper means of accomplishing that object. See *Nebbia* v. *New York*, 291 U.S. 502.

Petitioners recognize (Pet. 33–37) that Congress and the legislatures of the states involved, including New York, invoked police powers of both state and federal governments to authorize the cooperative campaign to control and eradicate the gypsy moth. Potential damage to plants and fruits by insects or diseases is, of course, a proper object of legislative concern and is comprehended within the broad power to promote community welfare and prosperity. *Miller* v. *Schoene*, 276 U.S. 272; *Sligh* v. *Kirkwood*, 237 U.S. 52, 59–60; *Missouri, Kansas & Tex. Ry. Co.* v. *May*, 194 U.S. 267; cf. *Oregon-Washington R.R. Co.* v. *Washington*, 270 U.S. 87.

While petitioners do not appear to question the legitimacy of the object of the program, they assert that the aerial spraying employed to attain that end interfered with their enjoyment of property rights and constituted a threat to the welfare of plant, animal, and human life. That objection must be considered in the light of this Court's statement in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 28, that "the

[5] As is shown in the brief in opposition filed in his behalf, the respondent New York Commissioner of Agriculture and Markets also had the requisite statutory authority to participate in the program.

means selected" do not become invalid or improper merely because they are "distressing and inconvenient or objectionable to some." When tested by that standard, it cannot be said that the means employed were unreasonable.

The district court found that "Mass aerial spraying of an entire area is the only feasible way of attempting to eradicate the gypsy moth" (R. 334a). That finding was based on reliable and sufficient evidence of the extent of the threat, the effectiveness of DDT in eliminating the threat, and the reasonableness of the particular method of spraying employed in this case.* Moreover, as the district court's detailed and comprehensive discussion of the evidence reflects, there was an abundance of expert testimony to the effect that DDT is not injurious to human beings in the amount used in the aerial spraying (R. 317a–321a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
RONALD A. JACKS,
Attorneys.

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* See, *e.g.*, Exh. A, pp. 6–10, 18–25; R. 124b–125b, 127b (nature and extent of the threat); R. 119b, 141b–142b, 185b, 200b, 208b–212b (effectiveness of DDT); R. 141b, 148b, 207b–208b (reasonableness of mass spraying).

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